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LET'S GO!

FOR us the world caved in at Pearl Harbor. Will it ever be the same again? Should it ever be the same? It has been turned upside down. The dislocations and multiplied inconveniences are in front, to the right, to the left, and in the rear. Take the formerly simple process of the householder going to market. Now he must wrestle with the problems of rationing, "points," as well as prices, and go exploring through the dealer's stock in a self-serving store instead of being courteously waited on by eager salesmen. All of which is as nothing, compared to the lot of the men in uniform over seas!

But this world paroxysm didn't just happen. "This effect defective comes by cause." It has a human origin. It was caused by men; it will be ended by men. But what then? Shall we go on and repeat the cycle? We permitted politicians whom we did not know and over whom we had no control to lead us into this inferno. Are we, up to date, doing anything at all to find the way out, and the means of staying out?

Or shall we allow war to persist among men? We do not need to be told by great scholars like Justice Holmes that law is the calling of thinkers; we know that from laborious experience

often to our cost! Our professional pride should be a sufficient stimulus to "prick the sides of our intent," to wake us up to a realization of the utter folly of these periodic convulsions, or any of them. Listen again to Caesar in Mr. Shaw's play: "And so to the end of history, murder shall breed murder, always in the name of right and honor and peace, until the gods are tired of blood and create a race that can understand."

We know that these mass murders arise from one cause only —from anarchy. That far at least we can agree with Professor Mortimer J. Adler (Department of Philosophy of Law, Chicago University). And if lawyers are specialists in anything, it is in extending the reign of law till there shall be no anarchy anywhere. To bring the world of peoples and powers under the sway of law, and establish justice among them, that is the task that challenges all men; that is the task in which lawyers are necessarily leaders.

Thomas Edison said, "One day science will invent a machine so terrible in its possibilities, so absolutely terrifying that man himself will be appalled and renounce war forever." The machine predicted seems to have arrived, in forms protean. But man is too dull to be frightened off war by its diabolical destruction. We must look to the irrestible power of organized rationality. And that is peculiarly our business. Read, ponder, and inwardly digest "The International Law of the Future." "The great event, parent of all others, is it not the arrival of a Thinker in the world?" The profession of the law is an army of thinkers; once aroused and active nothing can stand before them. Let's go!

The existence of anarchy anywhere on earth shames and disgraces us. International anarchy came in with the illusion and usurpation of national sovereignty. It is up to lawyers to remove the stigma. Let's go! —F. G. T.

A WORD FROM THE PRESIDENT

I AM GRATIFIED by reports of the section chairman for the first few months of work. While the attendance has varied from one meeting to another, general interest has been well sustained. The programs presented by our sections have been very profitable to those attending. Some may not have joined in the belief that the discussion would be printed *in extenso* and that it could be read with greater ease than to attend the meeting. It should be remembered, however, that only a few papers presented are printed, and that those attending get the benefit of section discussion which is never reported. The various section officers are now planning their fall and winter programs.* Members of the Association will find that attendance at these meetings will enable them better to keep abreast of the development of the law.

In addition to the section meeting programs the Round Table Committee (formerly the Law Lecture Committee) is at work on the Association's postadmission educational program of law lectures for the fall and winter months. Active practitioners in increasing numbers are finding it necessary to avail themselves of educational opportunities in order to keep currently informed in the changing field of law. To those attorneys now returning and who shall soon return in increasing numbers from military service we owe the duty of assisting them in becoming reestablished in the practice by refresher courses. The postadmission educational work of the Association and the section meetings are some of the many advantages of membership therein.

Harry J McClean

*Information about the various Sections, their activities, times and places of meetings, *et cetera*, can be obtained from the office of the Association. See the inside of the back cover of this number of the BULLETIN for more details.

INCRIMINATORY STATEMENTS AS EVIDENCE IN FEDERAL CRIMINAL TRIALS

By Harry Graham Balter, of the Los Angeles Bar

THE writing of this brief discussion has been impelled by two recent decisions of the Supreme Court of the United States, each of which from a different point of view relates to the admissibility in a criminal trial in the federal courts of incriminatory statements made by the defendant prior to his trial. Although dealing with unrelated phases of the admissibility *vel non* of incriminatory statements, the two decisions taken together reflect a narrowing process which should be called to the attention of the Bar.

A. Admissions and Confessions Made by a Defendant While in Custody of Arresting Officers

On March 1, 1943, the Supreme Court in the key cases of *McNabb v. United States,* 318 U. S. 332, and *Anderson v. United States,* 318 U. S. 350, held that since federal statutes direct arresting officers, whether Marshal or F.B.I. agent, to take the defendant before the nearest U. S. Commissioner or the nearest judicial officer for committment "immediately," any statements made by the defendant while in the custody of the arresting officers are inadmissible against him in his subsequent trial if as a matter of fact the defendant had not been taken before a committing magistrate for arraignment with all reasonable dispatch.

While the circumstances of the wringing of the confession from the defendants in each case were particularly obnoxious, bordering on anti-social "third degree" methods, Mr. Justice Frankfurter, in his opinion for the majority of the court in the *McNabb* case, made it clear that the interdict against the use of admissions and confessions, absent the taking of the defendant for immediate arraignment before a committing magistrate, was not based upon the coercive or involuntary nature of the statements made, which as we know would alone have been sufficient to make the admissions excludable, but rather upon the statutes.

Almost as soon as these sweeping decisions were handed down, a sharp controversy has been taking place anent the strictness with which the *McNabb* and *Anderson* decisions should be con-

strued. Was it the intent of the Supreme Court that all admissions and confessions should be excluded if it merely be shown that the defendant had not been "immediately" arraigned before a committing magistrate, or was it essential that exclusion should follow the failure to arraign immediately only if in fact the circumstances surrounding the extracting of the admission or confession showed coercion or involuntariness?

Most circuits, albeit half-heartedly, followed the clear edict of the Supreme Court to the letter and excluded all such statements even though not involuntarily given. See: *United States v. Gros*, 136 Fed. (2d) 878 (C. C. A. 9th Cir.); *Haupt v. United States*, 136 Fed. (2d) 661 (C. C. A. 7th Cir.); *United States v. Hoffman*, 137 Fed. (2d) 416, 421 (C. C. A. 2nd Cir.); *Runnells v. United States*, 138 Fed. (2d) 346 (C. C. A. 9th Cir.).

Almost alone U. S. District Judge Schwellenbach of the Eastern District of Washington, after a careful analysis in the case of *United States v. Klee*, 50 Fed. Sup. 679, was of the opinion that the doctrine of the *McNabb* case must be applied only where extremely aggravated circumstances accompanied the obtaining of an admission or confession prior to the arraignment of the defendant.

It is not too surprising, therefore, to find that the Supreme Court in the recent case of *United States v. Mitchell*, 88 L. Ed. 812 (decided April 24, 1944), in a decision written by Mr. Justice Frankfurter (who wrote the opinion in the *McNabb* case), materially cuts down the implications of the holding in the *McNabb* and *Anderson* cases.

In the *Mitchell* case, a police burglary case in the District of Columbia, the defendant within a few minutes after his arrival at the police station, in custody of arresting officers, admitted his guilt and told the officers of various items of stolen property to be found in his home and consented to their going to his home to recover the property. There is no inference of coercion, oppression, or involuntariness. However, the defendant was not actually arraigned before a committing magistrate until eight days after these statements were made.

Mr. Justice Frankfurter was compelled to admit that

"Undoubtedly his detention during this period was illegal. The police explanation of this illegality is that Mitchell

> was kept in such custody without protest through a desire to aid the police in clearing up thirty housebreakings, the booty from which was found in his home. Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct."

Mr. Justice Reed, who had sharply dissented in the *McNabb* and *Anderson* cases, concurs in the result, not however without inferentially indicating his lack of faith in the soundness of Mr. Frankfurter's original thesis in the *McNabb* case:

> "As I understood *McNabb v. United States* . . . as explained by the Court's opinion of today, the *McNabb* rule is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by this Court to be contrary to proper conduct of Federal prosecutions, the confession will not be admitted. Further, this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion. If the above understanding is correct, it is for me a desirable modification of the *McNabb* case.
>
> "However, even as explained I do not agree that the rule works a wise change in Federal procedure.
>
> "In my view detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary. The juristic theory under which a confession should be admitted or barred is bottomed on the testimonial trustworthiness of the confession. If the confession is freely made without inducement or menace, it is admissible. If otherwise made,, it is not, for if brought about by false promises or real threats, it has no weight as proper proof of guilt."

The basic postulate of the *McNabb* case is still hanging suspended. No definitive guide is apparent for the conduct of either arresting officers or defense counsel. Obviously the broad generalization of the *McNabb* case has been narrowed into closer

confines; but how far the narrowing process has gone may still remain for future Supreme Court decisions to indicate.

B. Fifth Amendment's Provision Against Self-Incrimination Does Not Protect Defendant in Federal Court Criminal Trial From Use of Compelled Testimony Given by Defendant in a Prior State Court Proceeding

One Feldman, a judgment debtor, was examined in a New York court on what would be called in California "supplementary proceedings." New York statutes compelled such testimony to be given, but granted the defendant immunity from the use of such testimony against him if subsequent criminal proceedings were brought. A later New York statute broadened the debtor's immunity so as to free him from prosecution on account of any matter revealed in his testimony.

Feldman's testimony at these proceedings brought out a "check kiting" procedure. Later he was indicted in federal court on a charge of using the mails in a scheme to defraud executed by the "kiting" of checks. In this trial the government introduced Feldman's testimony in the New York supplementary proceedings. Feldman did not take the stand. No doubt the subsequent conviction was based primarily on the use of this evidence.

Quaere: Whether the Fifth Amendment prohibited the admission against Feldman upon his trial in the federal court of the earlier testimony given by him in the state courts?

This precise question had never been decided by the Supreme Court. By a four to three decision (Murphy and Jackson, J. J., not participating) the Court, speaking again through Mr. Justice Frankfurter, upheld the conviction and the use of this compelled testimony. *Feldman v. United States,* 88 L. Ed. 1046 (May 29, 1944).

The Court reaches its conclusion *via* two paths of analysis: (1) That the Fourth and Fifth Amendments are entwined and that decisions holding that the interdict under the Fourth Amendment against unreasonable searches and seizures applies only to those made by federal officials and only in federal prosecutions, may by analogy be applied to a situation where the protection sought is against self-incrimination under the Fifth Amendment; and (2) That under our dual system of government, the Fourth and Fifth Amendments protect only against invasion of civil liberties by

the federal government and its agencies, so that, conversely, a state cannot, by operating within its constitutional powers, restrict the operations of the national government within its sphere.

> "And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, . . . incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. . . . Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. . . . This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, . . . and its admission, after timely motion for its suppression, vitiates a conviction. . . .
>
> "The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. There is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers. The Government here is not seeking to benefit by evidence which it extorted. It had no power either to compel testimony in the state court or to forestall such disclosure as a means of avoiding possible interference with the enforcement of the federal penal code. Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. . . .
>
> "Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution 'for or on account of any transaction, matter or thing concerning which' a New York court may have seen fit to require testimony. . . . The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court quite beyond the

reach even of the most alert watchfulness by law officers of the Government."

Mr. Justice Black wrote a sharp and penetrating dissent, concurred in by Mr. Justice Douglas and Mr. Justice Rutledge. In the opinion of the dissenters, the majority rule unjustifiably cuts down and narrows the protection broadly afforded by the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself."

> "Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now. . . .
>
> "Over his [Feldman's] objection, a transcript of his compelled testimony was used in the United States District Court to convict him of a federal crime. As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court. This would have been true whether the federal court proceeding had been non-criminal or criminal, and whether Feldman had testified as a mere witness or as a defendant. Nor could his forced testimony have been used had it been compelled by federal officers outside of a courtroom, by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas; or by state officers interrogating a suspect for the purpose of enforcing a federal law. There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it 'must have a broad construction in favor of the right which it was intended to secure.' . . . Today, however, the Court adopts a different approach to the task of construing the Fifth Amendment. We are now told that under certain circumstances compelled testimony is purged of the fatal taint which the Fifth Amendment places upon it, and that an accused can be convicted in a federal court on words he was forced to speak. The circumstances under which it is now held that men can be forced to convict themselves by their own testimony are, (1) that the testimony was compelled by state officers,

and (2) that the state officers were not acting to enforce federal law. These slight variations in the techniques of compulsion are considered a sufficient excuse to escape the Fifth Amendment's command against the use of compelled testimony by federal courts. Surely such a holding is not to be justified by the language of that Amendment. Within its sweeping prohibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling, whether by threats of imprisonment, physical torture, or other means. Testimony is not less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.

"Nor is the holding in this case to be defended as one which our federal system requires. This case presents no conflict between federal and state spheres of power such as that presented by cases involving the validity of federal and state immunity statutes, wherein it has been contended, unsuccessfully, that neither the United States nor a State can compel a witness to testify against him-

self unless it grant him complete immunity from prosecution in both jurisdictions. Feldman's objection to the use of his compelled testimony is not based on a claim that New York must grant him, or has granted him, immunity from prosecution for the federal crime it has forced him to confess. He does not question the power of the United States to prosecute him for that crime on proper evidence. Nor, for that matter, does he contend that the Fifth Amendment prevented New York from compelling him to confess a federal crime. He claims only that the Fifth Amendment's prohibition against self-incrimination prevents the use of his compelled testimony against him in the present proceeding. The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will. The Court's holding that a defendant can be so convicted cuts in to the very substance of the Fifth Amendment. And it so justifies this result not by the language or history of the Constitution itself, but by a process of syllogistic reasoning

based upon broad premises of 'dual sovereignty' stated in previous opinions of the Court relating to immunity statutes. Even were there here a 'dual sovereignty' problem, which there is not, such a method of decision would be questionable. Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in walls of formal logic built upon vague abstractions found in the United States Reports. . . .

"It is impossible for me to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with the principle of broad construction which this Court heretofore has deemed essential to full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. . . . Under our constitutional system the privileges it embodies and the rights it secures were intended to be above and beyond the power of any branch of government to mutilate or destroy. We have no assurance that the fears of those who drafted and adopted our Bill of Rights were groundless, nor that the reasons for those fears no longer exist. Ancient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed. . . ."

These decisions constitute a challenge to those who claim that the Supreme Court has presented a solid facade of liberal interpretation where the rights of accused in criminal cases have been involved. Here, at least, are two recent and important cases where the Court has applied a distinctly narrowing process.

JOINT TENANCY*

By Albert M. Cross, of the Los Angeles Bar

Historical Background

UNTIL about 25 years ago, joint tenancy estates were quite rare.

Lawyers and the public became increasingly aware of their advantages, in that the purchaser of property, real or personal, could take title in himself and a co-tenant or co-tenants, retain title in himself in case of the death of his co-tenant, and in case of his death the entire title would go to his co-tenant or co-tenants, with a very quick and simple procedure to show the survivorship of record, avoiding the expense and delay of a probate of the deceased co-tenant's estate. So joint tenancies began increasing by leaps and bounds, until now there are thousands, I may say tens of thousands, of joint tenancy estates in California.

All of this looks so desirable, so simple, and so easy of accomplishment, that it is surprising to find our supreme and appellate courts repeatedly have declared that joint tenancy estates are not favored by the California law. *Bowen v. May,* 12 Cal. 348 (1859); *In re Finley,* 103 Cal. App. 697 (1930); *Reiss v. Reiss,* 45 Cal. App. (2d) 740 (1941) (hearing denied by supreme court); 7 Cal. Jur., Cotenancy, §8, p. 339.

Equally surprising is the fact that no reason is given in these decisions for this lack of favor. It is simply a flat declaration. The last case cited (*Reiss* case, *supra*) repeated the disfavor, though stating that joint tenancy was favored by the common law from which California adopted it. Perhaps, as our thoughts run along together, we may discover some of the reasons for this judicial disfavor. One such reason we may now state in preliminary.

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*This article originated as an address delivered by Mr. Cross before the Probate, Real Property and Trusts section of the Association on March 15 and April 17, 1944. The editor was asked by several persons if the address would be printed in the Bulletin. Mr. Cross, in response to a request by the editor, revised his original manuscript for publication. The article, because of its length, cannot be printed in its entirety in one number of the Bulletin; but because of the excellence and thoroughness of the work, we thought it would be better to publish the entire article in two or three installments, rather than to eliminate any part of it.—Ed.

The reason the common law favored joint tenancy was because it was a feudal estate, devised to hold title to real estate in close ownership, by its incident of survivorship, and to prevent such title from scattering into numerous fractional interests in case of the death of one co-tenant—a favorite objective of the feudal law. 7 Cal. Jur., Cotenancy, § 3, p. 332.

Adopted by California with this foreign-born child was another foreign-born child from the Spanish law and the Napoleonic code of France, the latter child being highly favored by the California law—community property. Collisions occur between the feudal child and the Spanish-law child, presenting some perplexing legal questions.

Another highly favored child of the California law is the homestead estate, homeborn in our own statutes. You will recall the judicial eloquence, poured forth in numerous opinions, to the effect that the law favors, and construes very liberally, the homestead estate right, the beneficent purpose of which is to provide a shelter from the cold world for the family, and for widows and orphans, in time of reverses and disasters.

This homestead child gets into disputes with the joint tenancy child, introducing discord into the California legal family circle.

The California statutes dealing with joint tenancies do not define the incidents of a joint tenancy, taking the definition of the estate from the common law, where all of the incidents of a joint tenancy were clearly defined: namely, the four necessary unities of time, title, interest, and possession, and the incident of survivorship in case of death of a co-tenant.

Thus Civil Code §682, defining the ownership several persons may have in property, mentions "joint interests" without defining them; and Civil Code §683, declaring the method of creating joint tenancies, speaks of a "joint interest" and "joint tenancy" without further defining those terms. In *Estate of Guernsey*, 177 Cal. 211, 215 (1918), it is held that the "joint tenancy" therein referred to is the estate known as such at common law.

But the common law was somewhat uncertain, and the decisions in some conflict, as to the procedure and necessary language to create a joint tenancy. To make this indefiniteness definite, our legislature, in 1872, passed the originally short, clean-cut Civil

Code §683 as to creation of joint tenancies, based on Field's draft of the New York Code, as follows:

> "A joint interest is one owned by several persons, in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

From the start, our courts held that a joint tenancy could be created only in the manner provided in this section; and it was in this connection that our appellate courts declared that joint tenancies were not favored.

Amendments to the Statute

Before discussing further how joint tenancies may be created, it will be well to review three amendments to section 683 of the Civil Code, and how they came about.

When persons holding title in severalty or as tenants in common, or as community property, desired to put such titles in joint tenancy in themselves, or themselves and others, it had been necessary for all persons in title to convey the property to a third

person, and for that third person to convey the property back to the desired joint tenants. This involved the expense of, and burdened the records with, two deeds; and often the third person carelessly selected had a judgment against him, clouding the title, or was married to a woman who declined to join in the deed back. To obviate this situation, the legislature decided to authorize deeds in certain classes of cases conveying the property directly in joint tenancy from the owners to themselves, or themselves and others; and Civil Code §683 was amended, effective August 14, 1929, to read as follows (changes shown in italics):

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others or from tenants in common to themselves or to themselves and others* when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *No joint tenancy shall be created except as herein provided.*"

Now, at common law, a deed from a person to himself and another was of doubtful purport. All the cases agree a man could convey nothing to himself; the cases disagree as to what he conveys to his cotenant. See 18 Corpus Juris, §36, p. 159, and cases cited. One case there cited concluded that the grantor, having conveyed nothing to himself, conveyed the whole title to his cotenant. Other cases there cited, and the cases of *Deslauriers v.Senesac,* 163 N. E. (Ill.) 327, and *Wright v. Knapp,* 150 N. W. (Mich.) 315, held that the grantor, having conveyed nothing to himself, retains a half interest in himself; but his deed shows an intention to convey a half interest to his cotenant, and therefore he and his cotenant become tenants in common under the deed, with equal half interests.

When the legislature adopted this expedient in amending Civil Code § 683, trouble was forecast, and trouble came. Careless lawyers, real estate men, and escrow clerks, assuming to act as conveyancers, not noticing or heeding the limitations in the amendment, recorded a large number of deeds from anybody or anybodies to himself or themselves and others, in which the joint tenancies attempted to be created were invalid.

The lawmaking power became dubious about its experiment and the very next legislature amended Civil Code §683, effective

August 14, 1931, by cutting out all of the provisions in the amendment of 1929, authorizing these conveyances by parties directly from themselves to themselves and others, and restored the section to its original terms.

Again, lawyers and conveyancers, not noticing or not comprehending the amendment withdrawing authority for such deeds, continued to record deeds by parties from themselves to themselves and others in joint tenancy, which wholly failed to create joint tenancies.

The legislature evidently decided that in this situation the least of two evils was to restore the authority for the direct deeds from parties to themselves and others, for Civil Code §683 again was amended, effective September 15, 1935, and now in effect, to read as follows (again changes are shown by our italics):

> "A joint interest is one owned by two or more persons in equal shares by a title created by a single will or transfer when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others, or from tenants in common to themselves or to themselves and others, or from a husband and wife when holding title as community property or otherwise, to themselves or to themselves and others* when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *A joint tenancy in personal property may be created by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act.*"

Requirements Applicable to All Joint Tenancies Created by Deed

We shall first notice several requirements under Civil Code §683 and amendments applicable to *all* joint tenancies created by deed, to be followed by the requirements as to particular classes of deeds, the direct deeds, under Civil Code §683.

1st. The joint tenancy must be fully created in the same instrument which conveys the title. "A single will or transfer," the statute says.

2nd. The deed must expressly state the property is conveyed to the grantees as joint tenants. It is enough to add to the names of the grantees in the granting clause the magic words "as joint

tenants," *Period*. It isn't necessary to add, as often occurs, "and to the survivor of them." Survivorship is an incident of joint tenancy under the law, and need not be stated. *Hurley v. Hibernia Sav. etc. Soc.*, 126 Cal. App. 314, 322 (1932).

If the deed runs only to the grantees, or to the survivor of them, no joint tenancy results. To describe the tail does not describe the hide.

I call your attention to a mass of deeds on their face clouding the creation of joint tenancies which has caused title company lawyers many headaches.

Many of the printed deed forms contain a habendum clause at the end, reading "to have and to hold to the grantees, ... heirs and assigns forever." The deeds in question are properly filled out in the granting clause to the grantees as joint tenants, but the habendum clause is filled out, "*their* heirs or assigns forever." The phrase "their heirs," *i.e.*, heirs of both grantees, conflicts with the granting clause. There are rules in construing deeds that, in case of conflict, a later clause prevails over an earlier clause; that a *referendum* clause may limit, alter, or even change, the granting clause; and that written clauses prevail over printed clauses.

Title companies have adopted various attitudes as to these defective deeds. If the deed has been embedded in the title for a long period, with no estate of the deceased grantee probated, or, if probated, claiming no interest in the property in the deed, and the value of the property is not great enough to provoke litigation, the deed will be passed. In case of such deeds of recent date, or of the last deeds in the title, where all parties are still living, a new deed is suggested, executed by all parties grantor and grantee in the defective deed (if all are competent and willing), to a third party, and a deed back creating a sound joint tenancy. If such new deeds are not obtainable, and the original deed can be furnished for inspection, and, if the habendum clause is printed and the granting clause written, the deed may be passed. The difficulty here often is that the word "their" in "their heirs" is in the same writing or typewriting as the granting clause, thus preventing a written clause prevailing over a printed clause. Sometimes a quiet title action may be required as to interests acquired under the deceased grantee; and sometimes, where there is no probate of the deceased grantee's estate, an

affidavit may be accepted if it can show that the affiants are all of age, and are all of the heirs of the deceased grantee; that they depose and say that the joint tenancy is valid, and they make no claim to the property; and that all debts of the deceased have been paid. To avoid all this trouble, I suggest that the form of deed to be used in creating a joint tenancy contain no habendum clause. Such clause is not necessary, and is not contained in the statutory form of deed.

3rd. Note the importance of including the *marital status of all of the grantees* in all joint tenancy deeds. Bachelors, spinsters, widowers and widows can take together, in joint tenancy, because each takes a separate property interest, and the *same* title and interest. Two of the indispensable unities in a joint tenancy are that the parties take the same title and interest. None of the above parties can take with a married man, for his title and interest would be presumptively community property—a different title and interest from that of his cotenant. This would invalidate the joint tenancy. If the deed does not state the marital status of the grantees, it is impossible to tell from the deed whether they can or cannot take in joint tenancy. If stated, and all grantees can take separate property interests, the deed is clear.

The title companies have worked out a plan by which a married man may become qualified, right in the joint tenancy deed, to take in joint tenancy with another, taking a separate property interest, if his wife is willing to cooperate. There is California authority that a party having no interest in the title may join in the execution of a deed for the purpose of making certain covenants or agreements with the parties to the deed who are in title. *Holzheier v. Hayes,* 133 Cal. 456 (1901); 9 Cal. Jur., Deeds, §34, pp. 131, 132.

Into the joint tenancy deed, below the description, may be inserted a statement by the wife that she is the wife of the named grantee; that the interest he is acquiring under the deed was acquired with his separate funds, and is his separate property; and agreeing that the joint tenancy created in the deed is valid. The wife signs this statement and covenant, and acknowledges her execution of the instrument. Husband and wife can at all times agree as to the status of their property, whether community or separate property. Thus the husband's qualification to take a separate property interest with his cotenant is established.

Where a single man and a married man, as joint tenants, are payees in notes secured by mortgage or trust deed, there must be an endorsement by the wife on the notes, and endorsements on the mortgage or trust deed, similar to the above statement of the wife. I do not here set out the forms of these statements. When required, an attorney of the company which will be asked to insure the title will give them to you.

And do not make the mistake of trying, as many have, to qualify the husband to take in joint tenancy by having the wife subsequently execute a quitclaim deed to her husband, conveying to him as his separate property the property in the joint tenancy deed. This is a *second* instrument, seeking to make good the joint tenancy in the first instrument. The statute is imperative that the property be conveyed and the joint tenancy completely created *in a single instrument.*

The law will not tolerate an outside attempt to bolster up the joint tenancy. Comply with the statute, or there is no joint tenancy.

Effect of Deed or Will Intended to Create Joint Tenancy but Failing of Validity

Our next topic is this: In cases where wills devise land to devisees, or deeds convey land from owners in title to grantees, the will or deed attempting to create a joint tenancy, but the joint tenancy failing of validity, it does not follow that the devises or conveyances fail. If the will or deed is otherwise properly executed, the devisees or grantees become tenants in common, disregarding the attempted joint tenancy.

Now, why tenants in common? Tenancy in common is what we may call the "catch all" estate which always results under a devise or deed when no other estate is specified, or when the creation of some other estate is attempted, but fails.

Civil Code §682 provides that ownership of property by several persons is either (1) of joint interests; (2) of partnership interests; (3) of interests in common; or (4) of community interest of husband and wife.

Civil Code § 686 provides: "*Every* interest created in favor of several persons in their own right is an *interest in common unless* acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in section 683, or unless acquired as community property." (Italics added.)

Deeds From Owners to Themselves and Others as Joint Tenants

We now are ready to consider deeds in joint tenancy from owners to themselves, or to themselves and others under Civil Code §683 and amendments. These amendments are not retroactive. No statute is retroactive unless so provided either expressly or by necessary implication. Every deed of this character must be judged as to its validity by the statute in effect when the deed is executed.

The first class of such deeds, mentioned in the amendment effective August 14, 1929, was a transfer from a sole owner to himself and others. Civil Code §681 provides that ownership by a single person is designated sole or several ownership. A sole owner is a bachelor, spinster, widow, or widower, or a married man, if he owns the property as his separate property, acquiring it by inheritance, by gift, or with his separate funds. These facts, in case of a married man, *must appear of record*. A married man acquiring the property after marriage, even if it stands of record in his name alone, is not necessarily sole owner, because it is presumptively community property, and his wife may have a present existing equal interest in it under Civil Code §161a. A deed from a married man in this status to himself or himself and others is not a good joint tenancy, for he is not *sole* owner. Nor would a deed from him and his wife to himself and wife create a good joint tenancy under this clause, for the statute said "sole" owner, and *limited* the grantees to *"himself* and others."

The second class of such deeds, and the only other class mentioned in the amendment effective August 14, 1929, was "from tenants in common to themselves or to themselves and others." If the tenants in common owned of record separate property interests, they alone might thus convey, but if one or both of them were men holding as community property, their wives were co-owners having a community interest; and such wives must join with the husbands as grantors in such deed, and the wives with the husbands must all be the grantees in joint tenancy, because the statute only authorized a deed from tenants in common to *"themselves"*—all of them. There was a limitation on the grantees as well as the grantors. If such a deed, even if executed by all of the spouses, dropped out one of the spouses as grantees, it did not create a valid joint tenancy.

Note how in both these classes of deeds the statute protects the community property—the favorite of the law—against the disfavored child, the joint tenancy. An oversight, or an attempt to eliminate a community interest defeats the joint tenancy. And note that, under this amendment, neither owners holding in joint tenancy, nor husband and wife owning community property otherwise than as tenants in common, could convey to themselves and others in joint tenancy. There was no provision enabling joint tenants, or strictly community property owners, thus to convey.

The second amendment to Civil Code §683, effective August 14, 1931, repealed all of these provisions authorizing joint tenancy deeds from owners to themselves, or themselves and others. No deed of this character created a valid joint tenancy, if executed between August 14, 1931, and September 15, 1935, when the last amendment became effective renewing the efficacy of such deeds.

We now shall consider the third amendment to Civil Code §683, effective September 15, 1935, and still effective. This amendment restored to validity the two classes of deeds from a sole owner to himself and others, and from tenants in common to themselves or themselves and others, and what we have said above now applies to those two classes of deeds. This amendment added another class of such deeds: namely, "a transfer from a *husband and wife* when holding title *as community property or otherwise.*" This amendment for the first time includes husband and wife as a class, and authorizes them, if holding in joint tenancy or tenancy in common, as well as holding community property, to transfer in joint tenancy to themselves, or to themselves and others, for the statute says "holding as community property *or otherwise.*" Note that husband and wife cannot name as joint tenants less than themselves, for the statute says to "*themselves,* or to *themselves* and others."

This amendment does not authorize *joint tenants* (other than husband and wife) to convey into joint tenancy with themselves and others.

This amendment also added some new provisions as to joint tenancy in personal property and bank deposits which will be noticed later.

(To be continued in the September, 1944, BAR BULLETIN*)*

PROFESSIONAL ETHICS

OPINION NO. 151

(June 20, 1944)

PRACTICE BEFORE INDUSTRIAL ACCIDENT COMMISSION. **In California a layman may represent claimants under the "Workmen's Compensation Act" in hearings before the Industrial Accident Commission, and the activities of a layman employed by labor unions to aid their own members claiming benefits under the act are not per se unlawful. The relationship of a lawyer to such activities may or may not be unethical, depending on the facts of the particular case.**

ADVERTISING AND SOLICITATION. **It is improper for a lawyer even indirectly or by any remote or subtle control to solicit professional employment or to participate in any program or activity of solicitation by which professional employment is brought to him.**

A lawyer seeking the advice of this Committee relates at length the development of a "service department" within certain labor unions, having as its function the aiding of members in connection with claims for workmen's compensation under sections 4900-6149 of the Labor Code. We shall refer to the law as the Workmen's Compensation Act.

The "department," as we shall name it for convenience, consists of one salaried lay person who carries the title, "Chief Service Officer," and such stenographic help as the work requires. Announcements of the existence of the department and of the service available have been sent to those affiliated local unions whose central councils have endorsed the program. One such announcement, a card designed for posting on a wall, carries the caption "Labor Service Department" and reads as follows:

> "ALL MEMBERS AFFILIATED WITH THIS UNION
> —PLEASE NOTE:
>
> You are entitled to the advantages of YOUR Service Department. If you are turned down or underpaid on Workmen's Compensation, or sent back to work too soon, or if you have any questions that concern Workmen's compensation, your Service Department will endeavor to help you.
>
> Contact your Business Agent or Secretary or call the Service Department, at: "

Then follow the office address, a line reading "We Are Ready to Help You!" and the name and title of the Chief Service Officer.

To save trips to the department office, a supply of mimeographed forms is placed in the offices of the local unions whose

central councils have endorsed the project. This form is designed to carry a history of the case and closes with this authorization:

> "I hereby authorize my union to have its representative take whatever steps are necessary, including hiring counsel, to get my proper Workmen's Compensation benefits."

If in the opinion of the "chief service officer" a case needs professional assistance, the officer refers the union member to a lawyer. All such references have been to the same lawyer. If the lawyer accepts the case, he looks solely to the award of the Industrial Accident Commission for his fee. He receives no compensation from the department or from any union or central council for any service performed for any union member whom he meets through the department. The statement of facts does not indicate that on the part of the department or any intermediary or external agency there has been any interference with, or attempt to exercise any influence upon, the confidential relationship of attorney and client, the advice given, the service performed, or the fee charged.

The author of the letter before us says:

> "The lawyer from the inception of the matters . . . considered himself not as the representative of the union but only as the representative of the client who was referred to him and whom he represented."

We are not told that there is any agreement or understanding by which the department or any organization it represents is obligated to refer any cases to the particular lawyer. We are not told that the lawyer is under any contractual obligation to the department or to any union or central council, or that any con-

sideration moves from the lawyer to the department or to any body it represents. We are told of office arrangements and activities as follows: For a number of months the office of the department was in the same building as the office of the lawyer; later "as a matter of convenience" the department office was established "next door" to the lawyer's office; the latter used the department office as his reception room, while the services of his secretary were made available to the department. No monetary compensation moved in either direction for this arrangement. Later the lawyer moved his office across the hall from that of the department and because "he was unable to obtain a telephone," "took an extension from the telephone of the Service Officer." The bell for incoming calls rings in both offices. When the Service Officer is not present, and often he is not, union members who call are waited on by the lawyer or his secretary who talk to the callers and "try to assist them." "Possibly six-sevenths of all members who come in are advised generally and the attorney who accepts this as referred business makes no charge for simple advice."

Twelve questions are submitted by the inquirer. The authority vested in this Committee by the Los Angeles Bar Association is limited to dealing with questions of conduct by members of the bar. It is not the function of the Committee to consider questions arising from the practice of law by unlicensed persons or from activities that might be construed as involving such practice. This restriction denies us jurisdiction over a majority of the questions submitted, although, as it would be unethical for a lawyer to lend aid to the unlawful practice of law by a person not admitted to the bar, we deem it necessary to consider whether the department is engaged in such practice.

As to the activities of the lawyer and the acceptance of cases referred to him by the department, the inquiry suggests these questions:

1. Is the lawyer lending aid to the unlawful practice of law by a person or persons not authorized to practice?
2. Is he indirectly soliciting professional employment?
3. Are his services being controlled or exploited by any lay agency which intervenes between client and attorney? Is his relation to the client personal and his responsibility direct to the client?

4. Is there any division of fee or other compensation between the lawyer and a lay person?

5. Is the lawyer volunteering advice to bring lawsuits or is he stirring up strife and litigation?

6. Is the lawyer knowingly accepting professional employment offered to him as a result of, or as an incident to, the activities of an unlicensed person, who for compensation controls, directs or influences such employment?

We shall deal with these questions seriatim.

1. In California one form of law practice by persons not licensed to practice law has been made lawful by act of legislature. A layman may represent claimants before the Industrial Accident Commission.

> "Either party may be present at any hearing, in person, by attorney, or by any other agent and may present testimony pertinent under the pleadings." *Cal. Labor Code*, Sec. 5700.

Indeed, the Commission has invited the officers of labor unions to aid their members in such proceedings. *Shebrosky v. Morrison and O'Neil*, 1 I. A. C. (Pt. 2) 401.

If a layman may represent a claimant in hearings before the Commission, it is a corollary that he not only may do, but ought to do, everything reasonably and honestly necessary to prepare for such a hearing. That this field of practice has been opened to persons other than lawyers is a significant fact. It takes question numbered 1 out of the domain of professional ethics and places it in the realm of legislative policy. The activities of the department, as related to us, appear to be a lawful form of law practice, and thus it may not be said that the lawyer is lending aid to the unlawful practice of law.

2. Certainly it is lawful also for the department to advise a union member that his case ought to have the attention of a lawyer and to recommend some lawyer. If the department makes a practice of recommending the same lawyer, is the latter indirectly soliciting business because of the activities of the department? The answer to this question, we feel, depends on his relationship to the department. Is he in any degree one of the planners behind the department's activities? Does he have any contract or understanding that makes him a party to its activities?

By virtue of any such contract or understanding, is the department obligated to refer cases to him or is he obligated to accept such cases or accept them on any certain terms? Does any consideration move from him to the department for the reference of cases? If any of these questions could be answered affirmatively, we would conclude that the lawyer is using the department and its program as an indirect means of soliciting professional employment. In the recital of facts submitted to us there is no statement that would expressly support an affirmative answer to any of these questions, but the proximity of the lawyer's office to that of the department, the common use of office facilities and the department's reference to the lawyer of all its cases requiring professional assistance are suspicious circumstances. We believe that the voluntary services performed by the lawyer when union members come to the office of the department for aid are clearly unethical. The rendition of such gratuitous services by the lawyer is an unnecessary participation in the activities of the department and in our opinion cannot be considered otherwise than as an intentional utilization by the lawyer of the department's advertising with hope of gain in the form of professional employment. If there is any other circumstance, of which this Committee has not been informed and which so ties the lawyer into the department's program of solicitation that in effect professional employment is being solicited for him with his cooperation or that he indirectly is soliciting professional employment, then his connection with the program is definitely in violation of Rules 2 and 3 of Rules of Professional Conduct of the State Bar and Canon 27 of American Bar Association Canons of Professional Ethics.

3. It is our opinion that the facts given us do not support a deduction that the lawyer's services are being controlled or exploited by the lay agency. We definitely conclude that they are not being controlled. As his name is not used in any of the announcements, as there is no showing that the department is under any obligation to him, or he to it, and as it appears that the department is in a position to refer cases to any other lawyer at any time it may wish to do so, there does not seem to be an exploitation of this lawyer's services.

4. The record before us discloses no division of fees. It

might be said that in the economies effected as to office and secretarial facilities there is a division of benefit. As before stated, these are suspicious circumstances which the lawyer would do well to avoid, but we feel that it would be somewhat far-fetched to hold that in these arrangements there is a division of compensation paid for professional employment.

5. It is our opinion that the facts stated to us do not justify a conclusion that the lawyer is volunteering advice to bring lawsuits or that he is stirring up strife and litigation.

6. We have expressed our opinion that the facts do not support a deduction that the lay agency controls the lawyer's employment, and while they do show that the lay agency influences the choice of lawyer, as would any recommendation of a lawyer, the submitted facts indicate that once the relationship of attorney and client is established, the lawyer's performance of his duties is not directed or influenced by the lay agency, but is personal and solely in the client's interests, and is so intended by the lawyer.

Pertinent to the foregoing considerations are:

Rules 2 and 3, Rules of Professional Conduct of the State Bar;

Canons 27, 28 and 35 of American Bar Association Canons of Professional Ethics;

Opinions 8, 31, 35, 56, 98 and 169 of the American Bar Association Committee on Professional Ethics and Grievances;

Opinions 73, 93, 135 and 137 of this Committee.

This opinion, like all opinions of this Committee, is advisory only. (By-laws, Art. VIII, Sec. 3.)

COMMITTEE ON LEGAL ETHICS.

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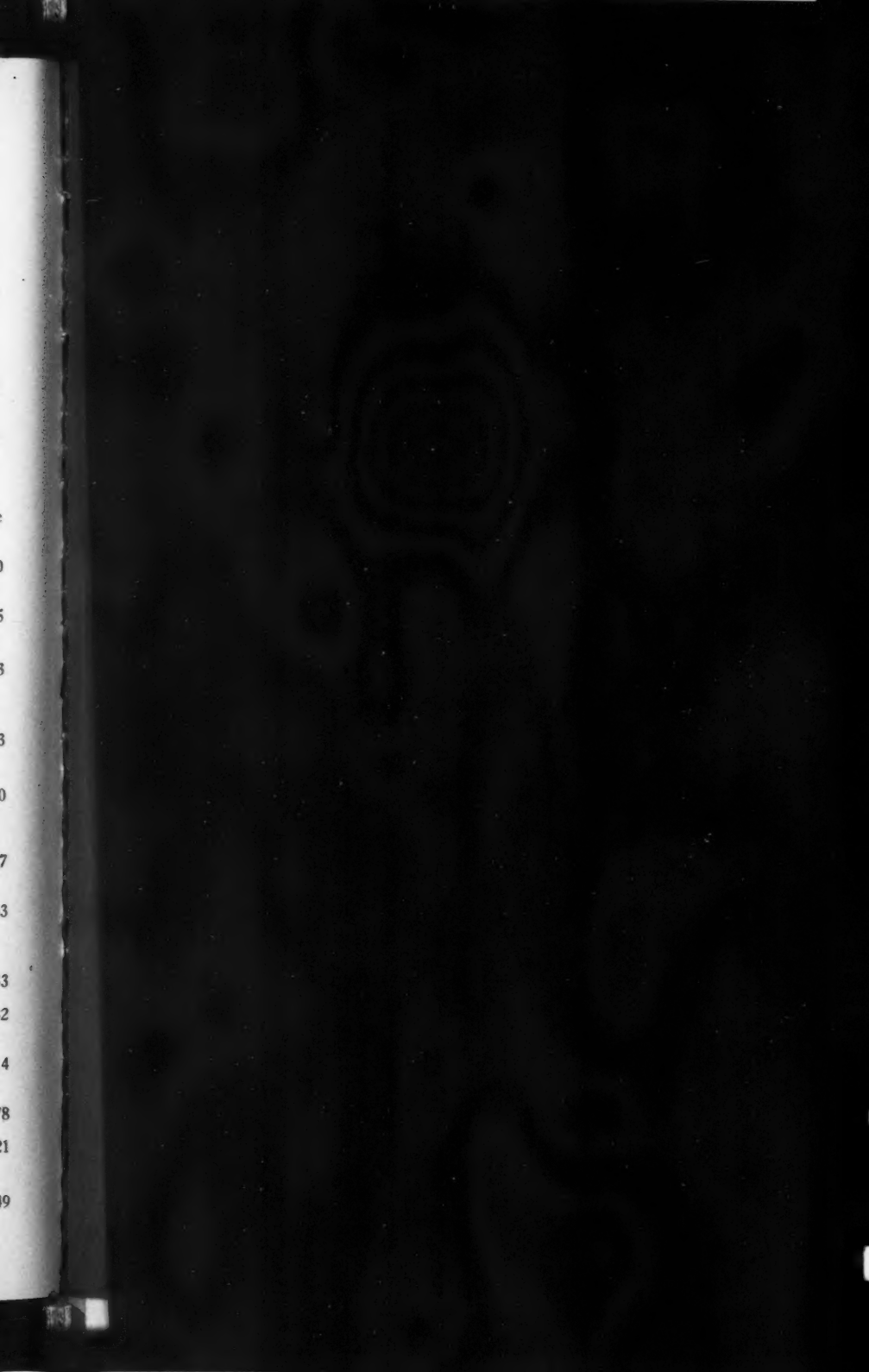

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